

Yongping XIAO*
Wuhan University

Zhengxin HUO**
China University of Political Science and Law

I. Introduction

Family is the very foundation of civil society, and no part of laws and institutions of a country can be of more vital importance to its subjects than those that regulate the manner and conditions of forming, and if necessary, of dissolving, the family. However, out of different historic, cultural and religious backgrounds, family law, as the body of law dealing with marriage, divorce, adoption, child custody and support, and other domestic relation issues, varies considerably from one country to another.¹ What bears particular mentioning is that the discrepancies in the field of family law among different countries are much more conspicuous compared with other fields of law, say, law of obligations. Under such a circumstance, the conflict of laws in this field is, accordingly, more serious.

Pursuant to Chinese scholarship and legislation, there exists no independent branch of law entitled “family law”; therefore, the expression of “family law” is not found in Chinese law, either in legislation or in legal literature. Nevertheless, Chinese law does have the substance that the family law deals with which, in China, falls within the scope of marriage and matrimonial law, and law on succession. In this light, this article will analyze the Chinese family law from the perspective of private international law in three aspects respectively, *i.e.*, marriage and divorce, matrimonial causes, and succession.

Undoubtedly, the past two decades have witnessed an amazing acceleration in the rate of, and significant progress in the quality of, legislation in China. Nevertheless, there is a long way to go towards accomplishing the task of building a modern legal system. The current crossroads at which China finds itself is graphically illuminated by the legislative development of private international law concerning family issues. So far, Chinese legislation of private international law in this respect is far from perfect, what we can find are but fragmented conflict rules among various statutes, regulations, and doctrines developed by courts and commentators despite the fact that choice-of-law problems concerned are emerging in huge numbers in recent years.

* Yongping Xiao is Dean of Wuhan University School of Law; Managing Vice-President of the Chinese Society of Private International Law; Member of Editorial Advisory Board of *Journal of Private International Law* (Hart Publishing, Oxford); Senior Research Scholar and Honorary Research Associate of Law School at University of Birmingham (2006).

** Zhengxin Huo is an Assistant Professor of Law of School of International Law at China University of Political Science and Law; Member of China Law Society; Member of Chinese Society of Private International Law; Visiting Faculty of College of Law at Seoul National University (2009-2010); Visiting Faculty of University of Minnesota Law School (2007).

¹ BRYAN A. GARNER (*ed.*), *BLACK'S LAW DICTIONARY* 621 (8th ed., 2004).

Hence, the purpose of this article is two-fold. First, it provides a thorough examination of the legislation and judicial practice concerning marriage and divorce, matrimonial causes and succession in China's private international law. Second, after introduction and summarizing problems concerning family law issues which currently exist in Chinese legislation, it puts forward suggestions for improvement.

II. Choice of Law in Marriage and Divorce Issues

In general terms, modern legislation concerning the choice-of-law issues of foreign marriage and divorce usually contains some common provisions, such as formal requirements of marriage, substantive requirements of marriage, personal and property effects of marriage, legal separation, divorce and same-sex marriage. However, current Chinese law regulates but two issues: the application of law in mixed marriage and divorce.

A. Marriage

The most important provision regulating foreign marriage is prescribed by the General Principles of the Civil Law of the People's Republic of China (hereinafter referred to as the GPCL).² The GPCL was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986, coming into force on January 1, 1987, and is still effective at present, assuming a prominent role in the area of civil law in China. Structurally, the GPCL has devoted an entire chapter to regulating the conflict of laws (*i.e.*, Chapter VIII, Application of Law in Civil Relations with Foreign Elements³), where the foreign marriage rule is embodied. Article 147 provides that:

The marriage of a citizen of the People's Republic of China to a foreigner shall be bound by the law of the place where they get married, while a divorce shall be bound by the law of the place where a court hears the case.⁴

Pursuant to this provision, it can be drawn that a marriage between a Chinese citizen and a foreigner within China shall be governed by Chinese law, while without by a foreign law, *i.e.*, *lex loci celebrationis* governs this kind of marriage. It should be noted that this provision fails to draw a distinction between formal requirements and substantive requirements of marriage, thus it follows that both requirements by the place of celebration shall be satisfied simultaneously. In this respect, Chinese law differs widely from the general international practice, insofar as in most countries, the substantive requirements are governed by the personal law of the parties to the marriage (the *lex patriae* or *lex domicilli*).⁵ This greatly simplifies the regulation and administration of international marriage. Not only does this rule make the task of marriage officials easier, as foreign law need not be ascertained to determine the capacity of the foreign partner, it also facilitates the protection of the

² So far, China has not yet drafted the code of private international law; therefore, the conflict rules are scattered among various separate laws and regulations among which the GPCL is the dominant. See XIAO YONGPING, XIAO YONGPING LUN CHONGTUFA [XIAO YONGPING ON CONFLICT OF LAWS] 324 (2002).

³ Chapter VIII is considered as a significant progress in the legislation of Chinese private international; however, like the rest of the GPCL, this Chapter does not purport to be a comprehensive codification. Instead, the nine article chapter is a mere skeletal consolidation of the of the few existing conflict rules together with some supplementary principles which China feels are sufficiently developed to be adopted.

⁴ Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 147 (1986) (P.R.C.).

⁵ WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 403 (2003).

Chinese spouse by applying Chinese law to ensure that the foreign spouse meets the Chinese standards required for a sound marriage.⁶

Moreover, under the “Answer of the Ministry of Civil Affairs to Several Issues Concerning the Registration of Foreign Marriage” issued on December 9, 1983,⁷ the parties should submit the documentations required by the “Provisions of Registration of Marriage between a Chinese and a Foreigner” when they apply for registration. In the meantime, in order to guarantee the universal validity of marriages celebrated in China, the parties are requested to produce the provisions of the foreign party’s home country to prove that they are also permitted to register there. Besides, this administrative regulation provides that on the basis of conventions or reciprocity, China recognizes the validity of the marriages between two foreign citizens of the same nationality which are celebrated before the consular of their home country either in the Embassy or Consulate to China as an exception to the rule of *lex loci celebrationis* inferred from Article 147 of the GPCL.⁸

Though the conflict rules are silent when a marriage between two foreigners takes place in China, these marriages, in most Chinese scholars’ arguments, are also governed by *lex loci celebrationis* deducing from Article 147 of the GPCL. It needs mentioning that, in practice, Chinese authorities do show some degree of flexibility, however, with respect to certain substantive requirements, such as age and consanguinity, and may make reference to the personal law of the parties as long as this is not inconsistent with China’s basic principles of the law on marriage.⁹

With regard to the marriage between two Chinese citizens outside China, it may refer to “Some Provisions on the Issues Related to the Marriage of the Overseas Chinese for the Chinese Embassies and Consulates” jointly issued by the Ministry of Foreign Affairs, the Supreme People’s Court, the Ministry of Civil Affairs, the Ministry of Justice and the Overseas Chinese Office of the State Council, though statutes fail to regulate it either.¹⁰ Under this Document, when dealing with marriages falling into this category, Chinese Embassies and Consulates should strictly follow the basic spirit of Chinese Marriage Act, with due consideration to practical situations of the parties where they live. The following is a case in point.¹¹

Wei Wang (Male, aged 21) and Li Zhang (female, aged 19) decided to marry who were both Chinese citizens and domiciliaries. However, their application was refused by the marriage registrar on the ground that the parties failed to satisfy the minimum age requirement provided by Chinese

⁶ It is interesting to note that, according to “Provisions of Registration of Marriage between a Chinese and a Foreigner”, following Chinese citizens are prohibited from marrying foreigners: persons in active military services, diplomatic personnel, public security officers, persons occupying crucial and confidential positions, and those possessing important classified information. See “Zhongguo Gongmin tong Waiguoren Banli Hunyin Denjig Jixiang Guiding” [Provisions of Registration of Marriage between a Chinese and a Foreigner], in The People’s Republic of China State Council Gazette 831 (Sept.30, 1983, No.18).

⁷ “Guanyu Banli Hunyin Dengjizhong Jige Shewai Wenti Chuli Yijian de Pifu”[Answer of the Ministry of Civil Affairs to Several Issues Concerning the Registration of Foreign Marriage”], dated Dec. 9, 1983.

⁸ Tung-Pi Chen, *Private International Law of the People’s Republic of China: An Overview*, 35 The American Journal of Comparative Law, 471 (1987).

⁹ HAN DEPEI & XIAO YONGPIN, GUOJI SIFAXUE[PRIVATE INTERNATIONAL LAW] 142 (2004).

¹⁰ “Guanyu Zhuwai Shilingguan Chuli Huaqiao Hunyin Wenti de Ruogan Guiding”[Some Provisions on the Issues Related to the Marriage of the Overseas Chinese for the Chinese Embassies and Consulates], Dated Dec.27, 1983.

¹¹ HAN DEPEI & XIAO YONGPIN, GUOJI SIFAXUE[PRIVATE INTERNATIONAL LAW] 143 (2004).

Marriage Act.¹² Soon afterwards, they participated in a tour group to Thailand organized by a travel agency where they went through a local religious ceremony of marriage valid under the domestic law of Thailand. After returning to China, they lived together as spouses. In the following year, however, Wei Wang died in a car accident, and disputes arose around the succession of Wang's estate between Li Zhang on one part and Wang's relatives on the other. Zhang believed that she was entitled to succeed as one of Wang's hereditary successors; however, the relatives of Wang argued otherwise. They submitted that Zhang and Wang failed to conclude their marriage before the Chinese Marriage Registration Authority because of nonage; therefore, their marriage was not valid, and that Zhang was not Wang's hereditary successor accordingly. Their arguments were upheld by the Court on the ground that Zhang and Wang's celebration of marriage in Thailand pursuant to the local religious ceremony constituted an invasion of Chinese law, or to be more specific, Article 147 of the GPCL. Hence, the court held that the alleged marriage was invalid, and Zhang was barred from succeeding.

We do not favor such a view, since Article 147 of the GPCL stipulates but the marriage of a citizen of the People's Republic of China to a foreigner, while the case in hand concerned the marriage between two Chinese citizens. In other words, Article 147 of the GPCL is not applicable to the present case. Since minimum age requirement provided by Chinese Marriage Act is compulsory for Chinese citizens, the Court may reject the validity of the alleged marriage directly under the Chinese law, instead of by invoking the doctrine of invasion of conflict-of-law rule. Therefore, we believe that there existed a mistake of the application of law in this case.

B. Divorce

With regard to the application of law in respect of divorce, "Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law" provides a more detailed provision than Article 147 of the GPCL, as Article 188 stipulates as follows:¹³

The divorce case involving a foreign national, divorce and partition caused by divorce accepted by the people's court in this country are governed by the law of this country. The determination of the validity of the marriage is governed by the law of the place where a marriage is registered.

The above provision, together with Article 147 of the GPCL, shows that once Chinese courts deem themselves possess the jurisdiction over divorce actions, they will always apply Chinese domestic law with the exception of determining the validity of the marriage, which is governed by *lex loci celebrationis*.

So far, there are no direct statutory conflicts rules with respect to the recognition of extraterritorial marriages and divorces other than between Chinese and alien parties, and the rules are completely silent with respect to questions of nullity. Normally, China recognizes all foreign marriages if they are valid according to the *lex fori*. As a practical matter, however, foreign marriages, divorces and

¹² Under Chinese law on marriage, no marriage may be contracted before the male party has reached 22 years of age and the female party 20 years of age. Late marriage and later childbirth shall be encouraged. Zhonghua Renmin Hunyin Fa [Marriage Act of the People's Republic of China] art. 6 (2001) (P.R.C.).

¹³ "Zuigao Renmin Fayuan Guanyu Zhixing Minfa Tongze Ruoguan Wenti de Yijian"[Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law] art.188 (1987)(P.R.C.).

nullities are practically characterized as questions of status, the connecting factor for which, in Chinese private international law is the *lex patriae* and predominates over all other conflict rules.¹⁴

Let's now examine a typical case.¹⁵

Huashi Wang (Male) and Chunhua Fu (Female) are Chinese nationals. They married in Beijing in 1987 and had a son in 1989. Huashi Wang left China alone for the United States to study in 1990 and graduated with a Ph. D six years later. After graduation, Wang was employed by a Canadian company in Ontario. In August 1997, Wang petitioned a Canadian Court for divorce on the ground of long separation, deliberately concealing the fact that he had a son in Beijing. The Canadian Court approved Wang's petition which was soon served on Fu via mail by Wang's counsel. Fu ignored the service of process, and commenced divorce proceedings in a Chinese Court in Beijing and petitioned the Court to make a maintenance order against Wang for the support of the child. Because of Wang's failure to appear in court, the Chinese Court granted a divorce decree by default and made an order for periodical payments imposed upon Wang of 350 Yuan (RMB) *per* month for the support of the child. Almost in the meantime, Wang obtained a divorce decree from the Canadian Court by default.

The crucial issue presented here is whether the Chinese Court has jurisdiction over the case in hand, since Wang has commenced proceedings over a similar cause of action in Canada *prior* to Fu's petition in China; that is to say, the present case concerns the problem of parallel proceedings. Generally speaking, most countries do not favor international parallel proceedings; however, in reality, parallel proceedings are not prohibited strictly in international civil litigation.¹⁶ Therefore, we assume that if Chinese law does not prohibit parallel proceedings, the jurisdiction of the Chinese court over the present case is defensible. So now let's examine the relevant provisions of Chinese law.

Promulgated on April 9, 1991, the Civil Procedure Act of the People's Republic of China stipulates the jurisdiction concerning personal status, as provided in Article 22 and 23:¹⁷

Article 22

A civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court of the place where the defendant has his domicile; if the place of the defendant's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of his habitual residence.

A civil lawsuit brought against a legal person or any other organization shall be under the jurisdiction of the people's court of the place where the defendant has his domicile.

Where the domiciles or habitual residences of several defendants in the same lawsuit are in the areas under the jurisdiction of two or more people's courts, all of those people's courts shall have jurisdiction over the lawsuit.

Article 23

¹⁴ *Supra* note 6, at 474.

¹⁵ HAN DEPEI & XIAO YONGPIN, GUOJI SIFAXUE[PRIVATE INTERNATIONAL LAW] 145 (2004).

¹⁶ See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES 472-475 (3rd ed., 1996).

¹⁷ Zhonghua Renmin Gongheguo Minshi Susongfa [Civil Procedure Law] arts. 22,23 (1991) (P.R.C.).

The civil lawsuits described below shall be under the jurisdiction of the people's court of the place where the plaintiff has his domicile; if the place of the plaintiff's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of the plaintiff's habitual residence:

- (1) those concerning personal status brought against persons not residing within the territory of the People's Republic of China;
- (2) those concerning the personal status of persons whose whereabouts are unknown or who have been declared as missing.
- (3) those brought against persons who are undergoing rehabilitation through labor; and
- (4) those brought against persons who are in imprisonment.

From the above provisions, we can draw that China generally follow the territorial principle of "the plaintiff submitting to the defendant" when dealing with the civil actions as provided in Article 22; however, under some special circumstances, it is the plaintiff's habitual residence that prevails as provided in Article 23. To be more specific, paragraph 2 of Article 23 is applicable in the present case.

Furthermore, on July 14 1992, the Supreme People's Court issued the Opinion on the Application of the Civil Procedure Law that provides a more detailed provision, as Article 15 stipulates as follows:¹⁸

The people's court in the place of domicile of the party residing at home may control over the divorce action in which one party of Chinese citizens is living abroad and the other party is living at home. In the event that the party living at broad files an action with the court of the state of residence and the party living at home files an action with the people's court, then the people's court that accepts the case is entitled to control over the divorce case.

Taking the above provisions into consideration, the Chinese trial judge held that the Court has jurisdiction to entertain Fu's cross-petition for divorce. Once The Court in Beijing deemed itself has the jurisdiction, it applied the Chinese law pursuant to Article 147 of the GPCL, and therefore, pronounced the decree in favor of the plaintiff.

However, it should be noted that the plaintiff could hardly benefit from the decree though she won the suit and the jurisdiction of the Court in Beijing was legitimate under the Chinese domestic law, insofar as scarcely can the judgment be recognized and enforced in Canada. Therefore, in practical terms, we suggested that Fu applied the Chinese court for a maintenance order against Wang instead of a divorce petition. Differently expressed, if Chinese Court recognized the divorce judgment rendered by the Canadian court and granted but a maintenance order, the interests of Fu and her son could have been protected better and more efficiently, since this order would be much easier to be recognized and enforced in Canada.

It merits emphasis that in family disputes involving its own nationals, the courts tend to apply its domestic law for the sake of protecting the interests of its own nationals. Nonetheless, we argue that

¹⁸ Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Guoheguo Minshi Susongfa Ruogan Wenti de Yjian [Opinions of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] art.15, dated July 14, 1992.

international comity, respect for the jurisdiction of courts of other states and due deference to pending or final proceedings over the same cause of action abroad are necessary for the smooth international civil and commercial communication. Recognition of the finality and validity of previous foreign judgments may under many circumstances serve to maximize the interests of private parties without impairing the judicial sovereignty of states.

III. Choice of Law in Matrimonial Causes

According to Chinese scholarship, matrimonial causes contain legitimation, adoption, guardianship and maintenance issues. Among these issues, the GPCL only has a conflicts rule for maintenance. Besides, the Adoption Act of The People's republic of China and "Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China" provides specific choice-of-law rules for adoption. Furthermore, the Judicial Interpretation of the GPCL stipulates the choice-of-law rule on custody. These provisions will be examined and commented on in this section one by one.

A. Maintenance

Article 148 of the GPCL stipulates the choice-of-law rule for maintenance which prescribes the following:¹⁹

Maintenance of a spouse after divorce shall be bound by the law of the country to which the spouse is most closely connected.

In order to specify this provision, the Supreme People's Court provides a more detailed explanation as follows:²⁰

The mutual fosterage between the parents and children, the mutual support between the couple and the mutual support between other people in relationship of support shall be applicable for the law of the country in the closest contact with the fostered. The nationalities and domiciles of the fosterer and the fostered and the place where the fostered property is situated may all be deemed as in the closest contact with the fostered.

From the above provisions, it follows that the Doctrine of Most Significant Relationship has been introduced into the field of maintenance, which promotes the flexibility of choice-of-law significantly. The Supreme People's Court of China goes on to hold that the nationalities and domiciles of the fosterer and the fostered and the place where the fostered property is situated may all be deemed as in the closest contact with the fostered, thus keeping a balance between flexibility and stability in judicial practice.

B. Adoption

Adoption Act of the People's Republic of China, effective as of April 1, 1992, makes the following provision for the choice-of-law rule in Article 20:²¹

¹⁹ Zhonghua Renmin Gongheguo Minfa Tongze [GPCL] art. 148 (1986) (P.R.C.).

²⁰ Zuigao Renmin Fayuan Guanyu Guanyu Guanche Zhixin Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian [Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law] art.189, dated Jan. 26, 1988.

²¹ Zhonghua Renmin Gongheguo Shouyangfa [Adoption Act of the People's Republic of China] art. 20 (1992) (P.R.C.).

A foreigner may, in accordance with this Law, adopt a child (male or female) in the People's Republic of China.

With respect to the adoption by a foreigner in the People's Republic of China, documents certifying such particulars of the adopter as age, marital status, profession, property, health and whether subjected once to criminal punishment shall be provided. Such certifying papers shall be notarized by a notarial agency or notary of the country to which the adopter belongs, and the notarization shall be authenticated by the Embassy or Consulate of the People's Republic of China stationed in that country. The adopter shall conclude a written agreement with the person placing out the child for adoption, register in person the adoption with a Chinese civil affairs department and complete the procedure for notarizing the adoption at a designated notarial agency. The adoptive relationship shall be established as of the date of the notarization.

What merits emphasis is that on November 4, 1998, the Standing Committee of the National People's Congress made a decision of revising the Adoption Act,²² which came into effect on April 1, 1999. According to this Decision, Article 20 of the Adoption Law listed above is changed into Article 21, with the second paragraph changed to make two paragraphs as the second and third paragraph, and is revised as follows:

Where a foreigner wishes to adopt a child in the People's Republic of China, the matter shall be subject to examination and approval of the competent authorities of the adopter's resident country in accordance with the law of that country. The adopter shall provide papers certifying such particulars of the adopter as age, marital status, profession, property, health and whether ever subjected to criminal punishment, which are issued by the competent agencies of the country to which the adopter belongs. Such certifying documents shall be authenticated by a foreign affairs institution of the country to which the adopted belongs or by an agency authorized by the said institution, and by the embassy or consulate of the People's Republic of China stationed in that country concerned. The adopter shall conclude a written agreement with the person who places out the child for adoption and register in person the adoption with a civil affairs department of the people's government at the provincial level.

If the parties or one party involved in the adoptive relationship wishes that the adoption be notarized, it shall be done with a notary agency that is qualified to handle foreign-related notarization and is designated by the administrative department of justice under the State Council.

What's more, on May 25, 1999, the State Council issued the "Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China" for a better implementation of the revised Adoption Law. Article 3 of this administrative regulation stipulates that:²³

If foreigners are to adopt children in China, the adoption shall conform to the regulations provided by relevant Chinese laws of adoption as well as relevant regulations provided by the

²² Zhonghua Renmin Gongheguo Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Shouyangfa de Jueding [Decision of the Standing Committee of the National People's Congress on Revising the Adoption Law of the People's Republic of China], dated Nov.4, 1998 Nov.4, 1998

²³ Waiguoren zai Zhongguo Shouyang Ziniu Dengjibanfa[Measures of the Registration for Foreigners to Adopt Children in the People's Republic of China],dated May 25, 1999.

country to which the foreigner belongs; if problems occur due to contradictions between the regulations provided in laws of the foreigner's host country and those provided in Chinese laws, the relevant governmental agencies of the two countries shall settle them through consultations.

The above provisions demonstrate unambiguously that both *lex patriae* and Chinese law govern the case when a foreigner adopts a child in China whose purpose is to guarantee the benefit and interest of child undoubtedly.

C. Guardianship

With regard to the choice-of-law on guardianship, China has no provisions in its national law so far. Nevertheless, in the judicial interpretation of the GPCL issued by the Supreme People's Court, we can find one stipulation as follows:²⁴

The institution, change and termination of the curatorship are applicable for the national law of the person under guardianship. However, the institution, change and termination of the curatorship are governed by the national law of this country if the person under guardianship has domicile in this territory.

This provision shows that Chinese courts basically refer to the *lex patriae* of the person under guardianship when they deal with issues of guardianship, with the exception where the domicile of the person under guardianship is in China. In the latter case, Chinese law will be applicable instead.

The above lists and examines the relevant provisions concerning adoption, maintenance and guardianship either in Chinese laws, administrative regulations or judicial interpretations; now let's look at a case concerning the issue of guardianship maintenance.²⁵

Genhu Zhao (male), a Chinese national, married Tomoko Sasaki, a Japanese female who was domiciled in China in 1985. They had a son named Xiaohu Zhao who was a Chinese citizen under the Nationality Law of P.R. C.²⁶ In 1990, Tomoko Sasaki left for Japan and refused to return to China any more. Subsequently, in 1993 Genhu Zhao commenced divorce proceedings in China and applied to the Chinese court for an order giving him the custody of Xiaohu Zhao, while Tomoko Sasaki applied for care and control of Xiaohu Zhao to be given to her. The Court inquired the intention of Xiaohu Zhao who, however, showed no definite inclination.²⁷ The court held that Chinese law should govern the issue of guardianship pursuant to Article 190 of the "Guidelines in

²⁴ Zuigao Renmin Fayuan Guanyu Guanyu Guanhe Zhixin Zhonghua Renmin Gongheguo Minfatongze Ruogan Wenti de Yijian [Guidelines in Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law] art. 190, dated January 26, 1988.

²⁵ QI XIANGQUAN, SHEWAI MINSHI GUANXI FALV SHIYONGFA [GENERAL THEORY OF APPLICABLE LAW OF FOREIGN CIVIL LITIGATION] 165 (2005).

²⁶ Under National Law of China, any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. Zhonghua Renmin Guofa [Nationality Law of the People's Republic of China] art. 4 (1980) (P.R.C.)

²⁷ According to "Some Particular Opinions of the Supreme People's Court Regarding the Treatment of Children Rearing Issue in Trial of Divorce Cases by the People's Courts", in the case of disputes occurring between the parents regarding which party a minor child will live with, the opinions of the child shall be taken into consideration. Zuigao Renmin Fayuan Guanyu Shenli Lihun Anjian Chuli Zinü Fuyang Wenti de Ruogan Juti Yijian [Some Particular Opinions of the Supreme People's Court Regarding the Treatment of Children Rearing Issue in Trial of Divorce Cases by the People's Courts] art.5, dated Nov. 3, 1993.

Trial Implementation of the Supreme People's Court on Implementing the General Principles of Civil Law", insofar as Xiaohu Zhao was a Chinese national and domiciliary. Moreover, pursuant to the Marriage Act of China²⁸ and judicial practice, Chinese courts will follow the principle of better ensuring the physical and mental health as well as protecting the legal interests of the children when dealing with the children rearing in the trial on divorce cases.²⁹ Taking all the relevant elements into consideration, the Chinese Court rendered a decree in favor of the plaintiff, i.e., Genhu Zhao.

As we know, the conflicts rules on guardianship of minors usually give priority to *lex patriae* of the person under guardianship for the protection of the interests of minors, which is epitomized in the Hague Conventions on children protection. Therefore, we believe the Chinese court in this case has sound grounds to apply Chinese law, which is not only in conformity with Chinese law but also mirrors the international trend of protecting the interests of disadvantaged group.

IV. Choice of Law in Succession Issues

Generally, the choice-of-law rules relating to succession are distinct depending on death testate or intestate. It is also necessary to examine the rules relating to the succession of vacant estate. For intestate succession, the *lex situs* governs immovables and the *lex domicilii* governs movables. For testamentary succession, the Succession Act conflict rules only speak to the essential validity of a will: *lex domicilii* for movables and *lex res sitae* for immovables, without regard to the testamentary capacity and formality of a will. The GPCL is completely silent with respect to testamentary succession.³⁰ With respect to estate without heirs or beneficiaries, China makes no distinction between movable and immovable property, both, depending on the status of the decedent, be forwarded to the decedent's national state or the organization of collective ownership for disposition. Let's now analyze the specific rules in detail.

Promulgated on April 10, 1985, the Succession Act of P.R.C. stipulates choice-of-law rules for the intestate and vacant succession, as Article 32 provides as follows:³¹

An estate which is left without successor or legatee shall belong to the state or, where the decedent was a member of an organization under collective ownership before his or her death, to such an organization.

Furthermore, Article 36 stipulates that:

²⁸ If a dispute arises between the two parents over the custody of their child who has been weaned and they fail to reach an agreement, the people's court shall make a judgment in accordance with the rights and interests of the child and the actual conditions of both parents. Zhonghua Renmin Hunyin Fa [Marriage Act of the People's Republic of China] art. 6 (3) (2001) (P.R.C.).

²⁹ Concerning the children rearing in the trial on divorce cases, the People's Court shall, for the purpose of better ensuring the physical and mental health as well as protecting the legal interests of the children, and considering the rearing capacity of both the father and mother as well as the rearing conditions, comply with the provisions in Articles 29 and 30 in the "Marriage Act of the People's Republic of China of the People's Republic of China" to perform proper trial on the cases of divorce. Zuigao Renmin Fayuan Guanyu Shenli Lihun Anjian Chuli Zinü Fuyang Wenti de Ruogan Juti Yijian"[Some Particular Opinions of the Supreme People's Court Regarding the Treatment of Children Rearing Issue in Trial of Divorce Cases by the People's Courts] preamble, dated Nov. 3, 1993.

³⁰ *Supra* note 6.

³¹ Zhonghua Renmin Gongheguo Jichengfa[Succession Act of the People's Republic of China]art. 32(1984) (P.R.C.)

For inheritance by a Chinese citizen of an estate outside the People's Republic of China or of an estate of a foreigner within the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply.

For inheritance by a foreigner of an estate within the People's Republic of China or of an estate of a Chinese citizen outside the People's Republic of China, the law of the place of domicile of the decedent shall apply in the case of movable property; in the case of immovable property, the law of the place where the property is located shall apply.

Where treaties or agreements exist between the People's Republic of China and foreign countries, matters of inheritance shall be handled in accordance with such treaties or agreements.

Moreover, according to the judicial interpretation issued by the Supreme People's Court, if, in the succession of movables involving foreign elements the succession shall be governed by the law of the seat of the deceased, *i.e.* governed by the law of the country where the deceased has his domicile before his death.³²

The GPCL, effective as of January 1, 1987, also has the provision relating to succession, as Article 149 provides that:

In the statutory succession of an estate, movable property shall be bound by the law of the decedent's place of last domicile, and immovable property shall be bound by the law of the place where the property is situated. In the statutory succession of an estate, movable property shall be bound by the law of the decedent's place of last residence, and immovable property shall be bound by the law of the place where the property is situated.

As we know, many countries have adopted the principle of unity of succession by which questions relating to intestacy or wills are governed by one single law, *i.e.*, the personal law of the deceased, irrespective of the nature of the subject matter. Other countries, such as England, have consistently adhered to what is called the principle of scission by which the issues are dealt with separately, with the result that the destination of movables on the death of the owner is governed by the law of his domicile, whilst the destination of immovables is governed by the law of the *situs*.³³

Apparently, the above provisions either in Succession Act or GPCL demonstrate that China falls within the latter category, that is to say, China adopts the principle of scission. Nevertheless, a careful comparison between the earlier and later pieces of legislation will reveal some differences. First, Article 36 of the Succession Act does not make a distinction between statutory succession and testamentary succession, while Article 149 of the GPCL states unambiguously that it applies but to statutory succession. Second, Article 149 of the GPCL specifies that decedent's place of last domicile governs the statutory succession of movable property, thus settling the possible conflict of domiciles if the decedent has more than one domicile.

The following is a case in point concerning succession issues.

³² Zuigao Renmin Fayuan Guanyu Guanche Zhixing Zhonghua Renmin Gongheguo Jicheng Fa Ruogan de Yijian"[Reply of the Supreme People's Court on Issues in the Implementation of the Succession Act of the People's Republic of China], art. 63, dated Sept. 11, 1985.

³³ PETER NORTH & J. J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 985 (13th ed. 1999).

Wu is a Chinese national who was a university teacher in Shanghai. In 1988, Wu went to Japan to study. In 1990, just before his return to China, Wu died from an unexpected car accident, struck down when riding a bicycle. Zhou, Wu's wife, in company with Wu's brother, went to Japan to deal with the legal issues arising from the accident. The outcome was a compensation agreement with the Japanese driver. The compensation consists of three parts: (i) "the expected interest" which represented the estimated income that Wu would obtain during the remainder of his life; (ii) compensation for mental injury of the victim's relatives; (iii) the damages for the bicycle. In addition, Zhou received insurance compensation paid by a Japanese insurer under a life insurance contract with Wu as the insured. Therefore, the total sum that Zhou receives is more than 700,000 yuan (RMB).

After Zhou came back to Shanghai with Wu's brother, disputes arose between Zhou on one part and Wu's parents and siblings on the other as to the distribution of the compensation and insurance compensation. The latter then filed a petition in a court in Shanghai against Zhou.

The plaintiff argued the following: First, insurance compensation was the estate of Wu instead of the common property shared by Wu and Zhou which, therefore, should be inherited by Zhou, Wu's child, and his parents.³⁴ Second, the expected interest and compensation for mental injury should also be classified as the estate of Wu instead of the matrimonial property, which accordingly should be distributed likewise. Third, the maintenance fee for Wu's daughter should be reserved in advance totaling 10,000 yuan.

Zhou, the defendant, however, submitted the following arguments: First, since the insurance compensation was paid by the Japanese insurer in Japan, conflict-of-law rules of the *forum*, therefore, should be invoked. Under Article 36 of the Succession Act and Article 149 of GPCL, Zhou submitted that Japanese law should govern the distribution of the insurance compensation, and pursuant to Japanese law, decedent's spouse and children are the successor(s) in first order,³⁵ therefore, Zhou and her daughter should inherit this part of estate equally. Second, since Chinese law had no provisions about compensation for mental injury the distribution of which should, therefore, take the following elements into consideration: firstly, the interests of the person whom the decedent supported should be given priority, insofar as he (she) generally lack the ability to support himself (herself); Secondly, the interest of a closer relative should be given priority to a more distant relative. Taken the above elements into consideration, Zhou submitted that Wu's daughter was entitled to inherit the majority of the compensation for mental injury. Moreover, Zhou argued that "the expected interest" should be classified as matrimonial property rather than the estate of Wu, since it represented the estimated income that Wu would obtain if he had not been dead. Therefore, she was entitled to half of the "the expected interest".

The present case triggers a series of conflicts issues among which we argue that the classification of the sum of 700,000 yuan in terms of its different sources is the first one. Generally, there can be little doubt that, in practice, classification in a private international law case is affected on the basis

³⁴ Pursuant to Succession of Law, decedent's spouse, children and parents are the successor(s) first in order. Zhonghua Renmin Gongheguo Jichengfa [Succession Act] art. 10 (1984) (P.R.C.)

³⁵ See arts 887 and 900 of Civil Code of Japan.

of the law of the *forum*.³⁶ There is, however, one type of case in which the judge probably will not make the classification on the basis of *lex fori*. This is where the relevant foreign institutions are unknown to the *lex fori*.³⁷ Under the latter circumstance, it is established the foreign law to which the institution belongs should govern the classification.³⁸

In this vein, “the expected interest” in the present case should be classified under the Japanese law for which Chinese law made no provision at that time; while the classification of rest of the 700,000 yuan should be governed by the Chinese law. Pursuant to Japanese law, “the expected interest” is the expected income of Wu on the assumption of his survival, which actually is not the income within the duration of the marriage. Hence it should be qualified as the estate of Wu rather than matrimonial property. As to the classification of the insurance compensation, under Chinese law, it depends on whether the insurance contract designated a beneficiary. If there is a specific beneficiary other than Wu himself, the insurance compensation should be excluded from the estate; otherwise, it constitutes a part of the estate instead of inter-spousal property. As the compensation for mental injury acts as a comfort for Wu’s relatives to decrease their mental suffering, it should not be distributed as estate. The damages for the bicycle, needless to say, should be included as a part of the estate.

Second, since the case in hand concerns the statutory succession of movable property involving foreign elements, the law of the decedent’s place of last domicile shall govern the distribution of the estate which is invoked by Article 36 of Succession Act and Article 149 of the GPCL. Under such a circumstance, the Chinese Court should determine whether Wu has obtained a domicile in Japan under Japanese law. If the answer is affirmative, Japanese law should, accordingly, govern the distribution of the estate; otherwise Chinese substantive law should prevail.

Furthermore, it should be noted that the doctrine of *renvoi* may manifest itself in this case. In order to elucidate this issue, it is necessary to survey the Chinese law on the doctrine of *renvoi* at the outset.

Basically speaking, this is a special problem in private international law to which no nation has found a totally satisfactory solution. To date, there have been no reported cases in China in which the doctrine of *renvoi* has been used, nor are there statutes which expressly direct the courts to consider the conflict rules of a foreign jurisdiction. Despite the absence of express references, an argument may be made that *renvoi* has been partly accepted by the Chinese conflicts law. Evidence of this can be found in “Provisions of Registration of Marriage between a Chinese and a Foreigner”.³⁹ Pursuant to Articles 3(B)(c) and 3(C)(c), foreigners wishing to marry a Chinese national in China must prove their martial status by producing a certificate of martial status notarized and authenticated in the applicant’s own country, or a similar certificate issued by the embassy or consulate of the applicant’s own country stationed in China. By means of this provision, China is recognizing the foreign certificate or decree of marriage, divorce, or nullity as valid and conclusive under all the laws of *lex patriae*. In other words, when referring to the *lex patriae*, in order to determine the martial status of a foreigner, the reference includes the conflict rules of the

³⁶ See NORTH & FAWCEET, *supra* note 33, at 38.

³⁷ See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 72 (Special ed., 2005).

³⁸ HAN & XIAO, *supra* note 9, 155-156.

³⁹ *Supra* note 6.

foreigner's national law. Thus these two provisions may be regarded as incorporating the doctrine of *renvoi* into the Chinese-Alien Marriage Regulations.

While evidence of *renvoi* does not appear to exist in other situations, the majority of Chinese scholars advocate adopting partial *renvoi* in certain cases (including succession cases) which result in remission where the foreign conflict rules refers back to the application of Chinese law, but not transmission where the foreign conflicts rules direct the application of a third country.⁴⁰

In this light, if the judge in this case intends to apply Chinese law, he may succeed by referring to the conflicts rule of the Japanese Conflicts Code, insofar as Article 25 of the Code provides that the succession of an estate shall be bound by the *lex patriae* of the decedents.

V. Conclusion

Three decades has passed since China opened its door to the outside world. During this period, family disputes involving foreign elements have been increasing by leaps and bounds. However, as we can see from the discussion *supra*, Chinese legislation in this field is far from perfect, with many important issues unprovided and a number of existing provisions unsatisfactory.

After providing a systematic review, we now summarize the problems existing in the current rules, and put forward our corresponding suggestions. It is our hope that these suggestions will be helpful to the Chinese authorities in improving the legislation as the National People's Congress of China (hereinafter referred to as NPC) is planning to draft the conflicts law code pursuant to the Tenth Five-Year Legislation Project of NPC.⁴¹

First, it is important to note that among various family issues, Chinese law has a few choice-of-law rules for very limited issues such as marriage, divorce, maintenance, adoption and custody, thus leaving a considerable legal vacuum for many important family issues, say, personal and property relation between husband and wife, property and property relation between children and parents, and testamentary succession. Within such a setting, further efforts need to be made to improve China's legislation urgently; otherwise, the stability and predictability of family relations will be undermined.

Second, as we can see from the above analysis, the existing provisions among Chinese laws are not consistent, for instance, the provision of the Succession Act concerning intestate succession is somewhat different from that of the GPCL. In addition, the sources of current choice-of-law rules are by no means uniform, insofar as some are national statutes, some are administrative regulations, while others are judicial interpretations. The complexity of sources will, definitely, make the application of these rules much more difficult in judicial practice. Therefore, we suggest that when the NPC drafts the conflicts law code, the current provisions scattered among various separate laws, regulations and interpretation should be cleaned up and harmonized, so that a uniform and complete framework of conflicts rules in family law will be established.

⁴⁰ However, Chinese scholars believe that the doctrine of *renvoi* has no place in the field of obligations. CHEN, *supra* note 8, at 453; HAN & XIAO, *supra* note 9, at 83-84.

⁴¹ http://news.xinhuanet.com/ziliao/2003-01/18/content_695167.htm.

Third, it is worth emphasizing that some of the existing rules are theoretically flawed and practically troublesome, therefore, they should be revised and modernized as soon as possible. The following are our specific suggestions.

In the first place, the current choice-of-law rule for marriage, *i.e.*, Article 147 of the GPCL needs to be improved. Firstly, it fails to cover all categories of marriage involving foreign elements. As we know, the marriage of a Chinese citizen to a foreigner is only one possible category of marriages involving foreign elements, in addition to which the marriage between two Chinese nationals celebrated in a foreign jurisdiction, the marriage between two foreign citizens celebrated in China, and the recognition of marriage between two foreign citizens concluded in a foreign jurisdiction are possible categories of foreign marriages that Chinese courts may face. Therefore, the scope of the choice-of-law rule for marriage should be expanded so as to cover all types of marriages involving foreign elements.

Secondly, as stated earlier, this rule lumps the formal requirements and substantive requirements of marriage together which apparently is archaic and outmoded, since the *dépeçage* analysis to marriage validity is commonly accepted by most countries nowadays.⁴² Today, it is generally established that rules about the validity of marriage for choice of law purposes are delineated into two classes: those addressing formal validity and those concerned with essential validity. The former is concerned with the law which governs the ceremony and related procedures required for the valid celebration of a marriage.⁴³ Essential validity, by the way of contrast, focuses on the capacity of the parties to create a personal status of husband and wife.⁴⁴ From the perspective of comparative law, the overwhelming majority of modern countries follow the principle of presumption in favor of validity of marriage to preserve the family, with marriage propagated as a desirable enclave for bringing up children. Under such a background, more and more countries adopt a flexible method to judge the formal validity of the marriage, that is to say, if the form of the marriage meet the requirements of either *lex loci celebrationis* or the personal law of the parties, it is recognized as valid. Nevertheless, due to the vital importance of marriage, most countries adhere to the strict requirements for the essential validity.⁴⁵

Taking the above considerations into account, we submit the following provisions as the suggestions for the legislation.

The essential validity and the legal effects of a marriage shall be governed by the law of the place where the marriage is celebrated.

The form of a marriage celebration shall be valid when it complies with the law of the place of celebration, or the national law of any of the parties, or the law of the domicile or habitual residence of any of the parties.

Marriages between foreigners with the same or different nationalities in the territory of the People's Republic of China can, according to the international treaties concluded or acceded to by the People's Republic of China or according to the principle of reciprocity, be proceeded by

⁴² ALAN REED, *ANGLO-AMERICAN PERSPECTIVES ON PRIVATE INTERNATIONAL LAW* 29 (2003).

⁴³ See generally, NORTH & FAWCETT, *supra* note 33, at 572-86.

⁴⁴ See PALSSON, *MARRIAGE AND DIVORCE IN COMPARATIVE CONFLICT OF LAWS* CH.6 (1981).

⁴⁵ HAN & XIAO, *supra* note 9, 141-142.

the consular of the state to which any of the parties belongs in accordance with the law of that state.

Thirdly, as stated earlier, once Chinese courts hold that they have jurisdiction over divorce actions, they will usually apply Chinese domestic law. Considering the seriousness and strong impact of the dissolution of the marriage over the social stability of the *forum*, *lex fori* is generally acceptable. However, the attitude of Chinese law towards parallel divorce proceedings is unfavorable which is clearly revealed by *Fu. v. Wang*. Within such a setting, we suggest that China should follow the established principle of discouraging parallel proceedings, and the following rules are our proposals:

The courts of the P. R. C. shall have jurisdiction over a divorce action, if a party having a domicile or habitual residence in another country has the nationality of the PRC, and that country where his domicile or habitual residence is located declines or fails to provide judicial remedies.

Unless otherwise provided by the international treaties concluded or acceded to by the PRC, where a foreign court has rendered a judgment over an action between the same parties on the same subject matter or the action is pending before the court, a PRC court may not exercise its jurisdiction if it predicts the foreign judgment can be recognized in the PRC. However, a PRC court may exercise its jurisdiction over the action if the PRC court seizes the case first, or the legitimate interests of the parties cannot be safeguarded if the PRC court does not exercise the jurisdiction.

Last but not least, it should be mentioned that in August 2000, the Chinese Society of Private International Law, an academic organization located in China, drew up the “Model Law of Private International Law of the People’s Republic of China”, which embodies the latest and highest level of research in China in the field of private international law.⁴⁶ In the Model Law, the choice-of-law rules as well as the jurisdiction rules on family issues are well drafted which epitomize the latest achievement in the search for a coherent and complete structure of conflicts law by Chinese scholars. We, therefore, hope that the Model Law can serve as a major reference when the NP C carries out its project of codifying conflict rules.

⁴⁶ Chinese Society of Private International Law, Model Law of Private International Law of the People's Republic of China (2000); English version, 3 Yearbook of Private International Law 349-390 (Petar Sarczvic & Paul Volken eds., 2001)